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The opinion in support of the decision being entered today was *not* written
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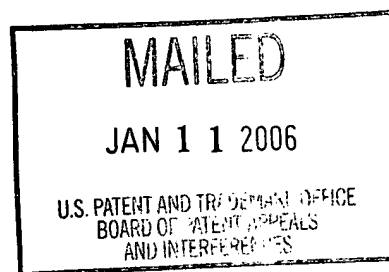
UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte BRYAN BERGERON

Appeal No. 2005-2167
Application No. 09/992,328

ON BRIEF



Before WARREN, WALTZ, and TIMM, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals from the final rejection of claims 1-10. Claims 11-17, the only other claims pending in the application, stand withdrawn by the Examiner pursuant to a restriction requirement (Brief, p. 1). We have jurisdiction over the appeal pursuant to 35 U.S.C. § 134.

INTRODUCTION

The claims on appeal relate to a drinking container for assisting a disabled person in drinking a fluid. Claim 1 is illustrative of the subject matter on appeal:

1. A drinking container for assisting a disabled person in drinking a fluid by reducing the degree of tilt necessary to drain the fluid from the container into the person's mouth comprising:

a fluid holding vessel having an upper rim and a closed bottom, said upper rim having an opening through at least a sipping region thereof,

a fluid diverter member contiguous with an inner surface and said bottom of said vessel, said diverter member sloping downward substantially from said sipping region of said rim toward an opposing side of said vessel such that when said bottom of said vessel is pivoted upward about said sipping region of said rim, said diverter member compels fluid through said sipping region.

Figure 1A depicts a cross-section side view of a preferred embodiment of the drinking container showing a vessel 2 with a sidewall 10 and a fluid diverter member 4 disposed generally along one side.

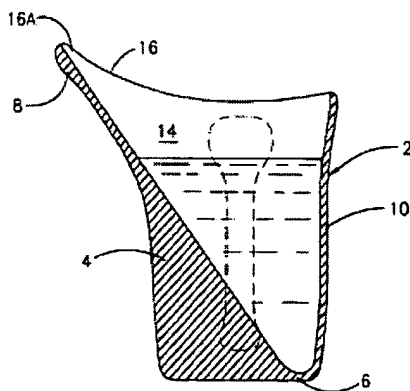


FIG. 1A

Of the issues of patentability advanced by the Examiner in the Final Office Action, only the issues under 35 U.S.C. §§ 102(b) and 103(a) remain (Answer, p. 3). To support the rejections under those sections of the statute, the Examiner relies upon the following prior art references as evidence of unpatentability:

Dixon, Sr. et. al. (Dixon)	US 4,146,157	Mar. 27, 1979
Watson	US 4,235,348	Nov. 25, 1980
Neville	US 5,645,191	Jul. 8, 1997
Rosen	US 5,950,857	Sep. 14, 1999

The specific rejections maintained are:

1. Claims 1-10 rejected under 35 U.S.C. § 102(b) as anticipated by Neville and Dixon;
2. Claims 1-6 and 8-10 rejected under 35 U.S.C. § 102(b) as anticipated by Watson; and
3. Claims 4, 5, 9, and 10 rejected under 35 U.S.C. § 103(a) as unpatentable over Neville or Dixon in view of Rosen.

We reverse with respect to all three rejections. Our reasons follow.

The claims are directed to a drinking container having a fluid holding vessel and a fluid diverter member. According to the Examiner, the tapered sidewalls of Neville and Dixon and the bottom floor portion 18, 18' of Watson are "fluid diverter members" as claimed.

Dixon has a similar sidewall. Neville and Dixon teach fluid holding vessels in accordance with the first clause of each of the independent claims (Claims 1 and 8). But each claim additionally requires a fluid diverter member within the container “contiguous with an inner surface and said bottom of said vessel.” While the Examiner argues that the fluid diverter member is not a separate element from the vessel, we

disagree. The claims are structured such that the vessel is defined separately from the fluid diverter member. The fluid contacting surface of the diverter member is not, contrary to the interpretation of the Examiner, the inner surface of the vessel, it is the outer surface of the fluid diverter member (claim 3; specification, p. 10, ll. 1-2). If the fluid contacting surface of the diverter member were the inner surface of the vessel, then the fluid diverter member would be contiguous with itself. It does not make sense to say that something is contiguous with itself, therefore, the language of the independent claims themselves, provide evidence of the faulty nature of the Examiner's interpretation.

The words "inner surface ... of said vessel" must be interpreted in a manner consistent with both the claims and the specification. *See In re Am. Acad. of Sci. Tech. Ctr.*, 70 USPQ2d 1827, 1830, 367 F.3d 1359, 1364 (Fed. Cir. 2004)(During examination, "claims ... are to be given their broadest reasonable interpretation *consistent with the specification*, and ... claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art."(emphasis added)). Appellant, moreover, is free to be his own lexicographer with regard to what he defines as an "inner surface" of the vessel and an "outer surface" of the fluid diverter member. *See In re Glaug*, 283 F.3d 1335, 1340, 62 USPQ2d 1151, 1154 (Fed. Cir. 2002)(Claim terms must be understood in the context in which the inventor presents them with the inventor's lexicography prevailing over other meanings). While the

specification is not a model of clarity on the issue presented, the key is that the interpretation advanced by the Examiner is unreasonable. Appellant here has used the language "inner surface of said vessel" to identify a surface that runs behind the fluid diverter member, i.e., a surface extending around the vessel in parallel with the outer surface of the vessel to form a uniform thickness sidewall behind fluid diverter member 4. This interpretation is consistent with the use of "inner surface" in the specification at page 8 wherein it is stated that "[t]he fluid diverter member 4 is contiguous with an inner surface and the bottom 6 of the vessel 2, such that fluid cannot seep behind the fluid diverter member 4." Essentially, the fluid diverter member is a bumped-out portion extending into the vessel interior from the sidewall. The fluid diverter member is defined on the vessel side by the inner surface of the vessel and defined on the outside, or fluid contacting side of the diverter member, by its outer surface (claim 3; specification, p. 10, ll. 1-2). Such a fluid diverter member, separate from the sidewall, is not described by either Neville or Dixon. The references have only a sidewall. There is no fluid diverter member.

With regard to Watson, the Examiner finds that bottom floor portions 18 and 18' shown in Figures 4 and 6 are fluid diverter members as claimed. But bottom floor portions 18 and 18' are portions of the spouts S1 and S2 of Watson's cup. These portions are not contiguous with the bottom of the vessel (closed bottom end 12) as required by the claims.

We conclude that the Examiner has failed to establish either anticipation or obviousness with respect to the subject matter of the rejected claims.

CONCLUSION

REVERSED

CATHERINE TIMM
Administrative Patent Judge

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APPEALS
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Page 7

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